

Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (ranked seventh).

Commentary by Guido Calabresi,
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Many questions left unanswered in that class, and in torts literature generally, like the reason for the "scope of employment" limitation on master-servant liability, seemed to me easy ones from even a simplistic economic perspective. Why, then, not look at torts law, indeed at all of law, from that perspective and see what one might learn?

Guido Calabresi

The first impression I had on rereading *Some Thoughts* thirty or so years after its publication, and thirty-five years after it was begun, is that much that was novel then seems obvious today; the second (more self-serving) impression is that it remains considerably more subtle in its appreciation of the limits of economic analysis than much that followed it.

The article had its genesis in the fall of 1955, when I was a student in Fleming James' Torts class. Many questions left unanswered in that class, and in torts literature generally, like the reason for the "scope of employment" limitation on master-servant liability, seemed to me easy ones from even a simplistic economic perspective. Why, then, not look at torts law, indeed at all of law, from that perspective and see what one might learn? Why not make that perspective more subtle; why not go beyond the limits economists themselves accepted, and see where that would lead?

The first full version of the article was submitted to *The Yale Law Journal* as my draft "comment" in the competition for Law Journal Officers. Though I was selected a "Note Editor," it was clear that my draft had disappointed the outgoing board, which included people of unusual brilliance who today properly dominate the profession. It was too complex and it didn't sound like law. This cold reaction led to a happy result for me: instead of being published and forgotten as an anonymous student comment, the manuscript was set aside to reappear four years later, when I was a junior faculty member, as my first article.

Perhaps there were new readers, or the times had changed. In any event, the reaction was totally different. Ronald Coase's magisterial article, *The Problem of Social Cost*, appeared some months later,¹⁰⁸ as did Pietro

108. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). As Judge Richard Posner has pointed out in his book, *THE ECONOMICS OF JUSTICE* 4 n.6 (1981), though Coase's article was properly dated

Trimarchi's stunning book, *RISCHIO E RESPONSABILITÀ OGGETTIVA*, which was published in Italy.¹⁰⁹ Harry Kalven and Walter Blum attacked my article brilliantly, but in precisely the way any author hopes to be criticized.¹¹⁰

Of course, many remained unaffected. At the Harvard Law School, it took some ten years before the approach evoked significant response. While at the Max Planck Institute in Hamburg, in 1965, my thesis was greeted icily by its great Director, Professor Konrad Zweigert, who commented, "Very interesting, very interesting, but of course you must realize it isn't legal scholarship." I rather rudely retorted: "It soon will be." If anything, it was quickly to be too much so!

I have one regret with respect to the article. An early version of it contained a fairly full analysis of causal reciprocity which paralleled that which Coase made so famous in *The Problem of Social Cost*. This draft was read by a distinguished economist who told me that I was quite wrong, citing, of course, Pigou. Coase received the same reaction from Stigler and the whole of the University of Chicago Economics establishment when he presented his manuscript at a workshop there.¹¹¹ Like Coase, I was not convinced; indeed, I did not understand the Pigovian reasoning. Unlike Coase, however, who stuck to his guns, I was not sufficiently sure of myself (or of my economics) and so removed the section. All that I left was a footnote, which, discussing the failure to charge drivers for injuries to pedestrians, says:

In effect such a result would amount to a decision that automobile accidents are more a true cost of walking and of living generally, than of automobile driving. Actually they are probably a cost of both.

I have not, in this article, attempted to probe what influences our decision that a particular "cost" is caused by one activity rather than another. Clearly this is an important question. Indeed, it is the next step in any thorough analysis of risk distribution. At this stage of analysis, however, when we have not yet examined the need and the effect of charging activities with those costs which all would agree they cause, that step seems somewhat far removed.¹¹²

That "next step" was not, of course, "far removed." My unwillingness to include a Calabresi version of Coase's theorem marked the last time I ever omitted something I thought correct as a result of criticism that I did not understand. In one sense, the matter is of no importance. Coase's analysis was so much more compelling than mine, and he understood its significance so

1960, it did not appear in print until later because the *Journal of Law and Economics* was several issues behind. This explains why neither he nor I cited the other.

109. P. TRIMARCHI, *RISCHIO E RESPONSABILITÀ OGGETTIVA* (1961).

111. See Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983).

112. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 506 n.24 (1961).

much more than I did (witness my failure in a subsequent article to grasp fully the total force of Coase's theorem¹¹³), that it would seem that all that was involved was the question of whether one or two people had the same insight at the same time; surely a trivial issue.

Unfortunately, however, that is not all there is to it. In *The Problem of Social Cost*, Coase presented his insight, and transaction costs analysis, from a distinctly anti-interventionistic, laissez-faire perspective. My ideological framework in the late '50s and '60s was very different (though nowhere near as skeptical of markets as Coase's had been twenty-five years earlier, when he wrote *The Nature of the Firm*).¹¹⁴ Accordingly, my version of Coase's theorem—like my whole article—served to justify intervention in order to assign costs in a way that reduced transaction costs. Had it been published, it would have been impossible for many to reject "Coase's Theorem" as mere "right-wing" ideology, since a "liberal" version would have been available at the creation. Similarly, those who tried to make of economic analysis of law a basis for blindly supporting the status quo would have found their path more difficult.

The fact of the matter is that Coase's insight, like all lasting contributions, transcended the politics of its author. Coase, of course, knew and appreciated this fully. Others, however, did not; some still don't. Had I not been frightened by an erroneous criticism, this fact would have been patently obvious and the Coase Theorem might well have had both a fuller and a more intelligent acceptance than it did.

Thirty years later the fundamental import of Coase's theorem is clearly recognized, and the point is of antiquarian interest only. It remains true, however, that advances in scholarship are richest when they occur independently to several people whose work imparts differing nuances to the insight. Hence my regret.

113. See, Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965) (which does not understand why Coase's theorem, on its terms, must apply to long-run as well as to short-run cost allocations). The error was noted and corrected in Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67 (1968).

114. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386 (1937). In retrospect one can see that *The Nature of the Firm* is based on an insight analogous to that in *The Problem of Social Cost*. In *The Nature of the Firm*, the insight explains why "command" or "collective" arrangements are frequently used in lieu of market ones; in *The Problem of Social Cost*, it explains how markets frequently modify and correct errors made by "command" or "collective" arrangements. The insight is enormously important and essentially the same; it is perhaps no accident, however, that in 1937 Professor Coase was a socialist, while in 1960 he was a libertarian.